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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

HUGO FANFASSIAN,

Plaintiff and Appellant,

v.

CITY OF LOS ANGELES,

Defendant and Respondent.

B259019

(Los Angeles County
Super. Ct. No. BC492417)

APPEAL from a judgment of the Superior Court of Los Angeles County, Holly E. Kendig, Judge. Affirmed.

McNicholas & McNicholas and Matthew S. McNicholas; Esner, Chang & Boyer, Stuart B. Esner, and Andrew N. Chang for Plaintiff and Appellant.

Michael N. Feuer, Los Angeles City Attorney, and Paul L. Winnemore, Deputy City Attorney, for Defendant and Respondent.

Appellant Hugo Fanfassian filed this action against his employer, respondent City of Los Angeles, for retaliation in violation of the California Fair Employment and Housing Act, Gov. Code § 12900 et seq. (FEHA) and Labor Code section 1102.5. Fanfassian specifically alleged that the City retaliated against him in the terms and conditions of his employment because he reported to the City that a fellow supervisory employee was sexually harassing a female subordinate. The trial court granted summary judgment in favor of the City and dismissed each cause of action in Fanfassian's complaint. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. Fanfassian's Employment with the City

Fanfassian has been employed as a police officer with the Los Angeles Police Department (LAPD) since 1984. In December 2008, Fanfassian began working in the Ethics Enforcement Section of the LAPD's Special Operations Division (SOD). SOD is a confidential unit in the LAPD's Professional Standards Bureau, and the Ethics Enforcement Section is a section in SOD that investigates LAPD officers by conducting surveillance operations and audits. Undercover officers in SOD typically are new officers who require intensive training in undercover work, and they are supervised by investigating officers in SOD who hold the rank of sergeant or detective. All SOD officers maintain undercover status based on their work.

During his assignment in SOD, Fanfassian held the rank of Sergeant II and was the Undercover Coordinator for the Ethics Enforcement Section. This position required more responsibility than other investigating officers in SOD as well as some prior experience in undercover operations. Detective Essie Mariscal was Fanfassian's direct supervisor during his tenure in SOD, and

Lieutenant Rolando Solano was the Officer in Charge of the Ethics Enforcement Section.

II. Fanfassian Reports the Alleged Sexual Harassment of a Subordinate Officer to His Superiors in SOD

In September 2009, Fanfassian reported to Mariscal that he believed Sergeant John Marquez, a fellow investigating officer in SOD, was engaging in inappropriate conduct toward a female undercover officer in the unit. Fanfassian specifically told Mariscal that he believed Marquez had an attraction to the officer, and that it was improper because Marquez was a supervisor and the officer was a subordinate. Fanfassian also stated that Marquez's conduct was "borderlining on sexual harassment," and that Mariscal "needed to take care of it." In response, Mariscal told Fanfassian that he was wrong about his allegations and that the conduct he was describing was out of character for Marquez. Fanfassian reiterated that he was reporting misconduct by Marquez, and that Mariscal needed to take appropriate action as a supervisor.

Mariscal spoke with Marquez about the allegations of misconduct raised by Fanfassian. Shortly thereafter, two other investigating officers in SOD approached Fanfassian and asked if he had reported a sexual harassment allegation about Marquez to Mariscal. These officers also told Fanfassian that they had heard about the matter from Marquez, and that Fanfassian "shouldn't be putting a jacket" on Marquez.

On or about September 21, 2009, Fanfassian reported to Solano that he believed Marquez had an inappropriate interest in the female undercover officer. Fanfassian also informed Solano that he had reported his suspicions to Mariscal and had told

Mariscal that Marquez's conduct toward the officer was sexual harassment. Solano did not believe, however, that the conduct alleged rose to the level of harassment or officer misconduct. Solano instructed Fanfassian to monitor the situation, and at the next monthly supervisor meeting, Solano made a statement reaffirming the LAPD's policy against sexual harassment. Solano did not take any other action in response to Fanfassian's allegations about Marquez.

III. Fanfassian Is Removed from the Undercover Coordinator Position and Transferred from SOD

Shortly after Fanfassian reported the alleged sexual harassment by Marquez, he began to have issues with his superiors for the first time during his tenure in SOD. In late 2009, Mariscal denied Fanfassian's request to complete certain audits by telephone even though she later allowed his successor in the Undercover Coordinator position to perform his audits telephonically. While Fanfassian was on vacation in December 2009, Solano and Mariscal conducted interviews with the undercover officers that Fanfassian supervised, and questioned the officers about Fanfassian and how he treated them. On one occasion, Solano falsely accused Fanfassian of using profanity over a radio broadcast while instructing a subordinate. On another occasion, Solano and Mariscal called Fanfassian into a meeting and counseled him for organizing a going-away party for a colleague who was leaving SOD.

On January 3, 2010, Captain Paul Hernandez became the Commanding Officer of SOD. Hernandez had a different vision and direction that he wanted to implement for the Ethics Enforcement Section. In particular, he was not satisfied with

the undercover training program that had been used by previous commands. The undercover officers were being trained only for the operations that they would be selected to perform, which limited their flexibility to deal with other impromptu operations. Hernandez wanted the undercover officers to be trained in every operation, including surveillance, to enhance the officers' level of confidence and expertise. Hernandez also wanted an undercover coordinator who could implement his plan for a more structured and intensive training program.

Upon taking command of SOD, Hernandez informed Solano of his vision and direction for the Ethics Enforcement Section. Solano recommended that Marquez replace Fanfassian as the Undercover Coordinator. With Solano's input, Hernandez made the decision to remove Fanfassian as the Undercover Coordinator in January 2010 and to assign Marquez to the position. At the time of this decision, Hernandez was not aware that Fanfassian had made an allegation of harassment or misconduct against Marquez. In early January 2010, Mariscal informed Fanfassian that he was being removed as the Undercover Coordinator, but did not provide any explanation for the decision. Fanfassian's removal from the position did not result in any change in his rank, pay grade, or benefits.

On March 9, 2010, Solano issued a written notice to correct deficiencies to Fanfassian for a comment that he had made about the job performance of an undercover officer. The incident arose out of a training exercise during which the undercover officer had to assist in following a suspect vehicle on the freeway. Solano observed the officer's performance during the exercise and did not believe the officer ever exhibited unsafe driving practices. At a subsequent debriefing, Solano complemented the officer on her

driving. Fanfassian then made a comment in the SOD squad room that he had observed the officer driving at excessive and unsafe speed during the exercise. After Fanfassian was issued the notice to correct for his statement about the officer's driving, he filed a grievance with his union. The grievance was later resolved by removing the notice from Fanfassian's personnel file and replacing it with a comment card. The comment card noted that, while Fanfassian's concern about the officer's driving "was genuine, it involved a personnel matter and could have possibly been overheard by other employees who had neither a reason nor right to know," and that "[a] closed door conversation would have been more in keeping with standard supervisory practices when discussing personnel matters."

In the months following Fanfassian's report of alleged sexual harassment, he also received some positive comment cards about his job performance. Solano issued positive comment cards to Fanfassian on September 24, 2009 and February 24, 2010, respectively, and another supervisor issued a positive comment card to Fanfassian on February 25, 2010. On August 29, 2010, Hernandez issued a positive comment card to Fanfassian for his performance in planning an operation. The comment card noted that Fanfassian was thorough with "every aspect of the planning," and that Hernandez felt "confident about [Fanfassian's] ability to oversee and lead others."

In October 2010, Solano assigned Fanfassian the task of preparing the monthly report for SOD's "secret service" funds, which are funds to be used for the unit's operational needs subject to the discretion of the commanding officer. Fanfassian prepared the report, but believed he had been assigned the task out of turn. After reviewing the report submitted by Fanfassian,

Solano found that it was deficient in several respects. Solano returned the report to Fanfassian with redlined corrections and orally counseled him about his work product, but did not impose any other discipline. Fanfassian conceded that the report was not properly formatted due to circumstances beyond his control, but denied making any errors in inputting the data. Around this time, another officer with prior experience in maintaining secret service funds joined SOD, and Solano assigned that officer the task of preparing the monthly fund report on a regular basis.

On December 2, 2010, Fanfassian was issued two negative comment cards by his superiors in SOD. One of the comment cards was issued by Hernandez based on Fanfassian's failure to timely correct a subordinate officer's breach of confidentiality protocol. The incident arose in November 2010 when Fanfassian observed an undercover officer come into SOD's office carrying an LAPD-issued duffle bag, known as a war bag, which identified him as a member of the LAPD. The officer's conduct was a violation of SOD's protocol of maintaining the confidential status of the unit and its officers. Fanfassian did not take immediate action when he saw the officer with the war bag because he was busy preparing for a time-sensitive operation. About a week after the incident, Fanfassian told another undercover officer to pass along the information about not carrying a war bag to the officer who had committed the violation. Hernandez decided to issue the comment card because he believed Fanfassian did not take appropriate action to timely correct the violation and disclose it to his superiors at SOD.

The other comment card was issued by Mariscal based on Fanfassian's statements to a subordinate officer about SOD's undercover officer program. The incident occurred in November

2010 when Fanfassian was partnered with an undercover officer for a ride-along and they had a discussion about officer safety tactics. Fanfassian asked the officer about her safety training, and she replied that the current Undercover Coordinator did not provide undercover officers with any training on tactical safety and instead restricted their training to surveillance. The officer later reported to Mariscal that, during the ride-along, Fanfassian made statements to the effect that the undercover officers in SOD were not being properly trained and that these officers would be far behind their peers when they returned to the field. After discussing the matter with Solano and Hernandez, Mariscal issued a comment card to Fanfassian for expressing his negative opinions about the undercover officer program to a subordinate. The comment card noted that Fanfassian's statements to the officer caused her unnecessary doubt about the program and negatively affected the morale of the undercover officers in SOD.

On or about December 5, 2010, Hernandez decided to transfer Fanfassian out of SOD. According to Hernandez, he made the transfer decision because Fanfassian was negatively commenting on his supervision of SOD and was actively resisting his new direction for the unit. Hernandez considered the three negative comment cards that had been issued to Fanfassian between March and December 2010. Hernandez also considered information provided by Solano and Mariscal about Fanfassian's job performance. Solano told Hernandez that Fanfassian did not agree with the vision and direction that Hernandez had for SOD, and Mariscal reported that Fanfassian did not approve of the training and supervision that the undercover officers were receiving in the unit. Based on the two incidents in November 2010 where Fanfassian failed to properly supervise a subordinate

officer and openly criticized the undercover training program, Hernandez believed that Fanfassian was resisting the new direction that was being implemented for SOD and attempting to sabotage the unit's mission.

IV. Fanfassian Is Transferred to Internal Affairs and Assigned to the West Los Angeles Office

Fanfassian learned that he was being transferred from SOD when Hernandez told him that he was no longer working there and that he needed to contact a certain commander to find a new position. Fanfassian was then referred to Captain Donald Schwartz, the Commanding Officer of the Internal Affairs Administrative Investigative Division. During a subsequent meeting with Fanfassian, Schwartz said that he had been told to find Fanfassian a place to work. Schwartz also said that he had spoken with Hernandez and that Hernandez had stated that Fanfassian had an attitude problem. Fanfassian requested an assignment to either the San Fernando Valley office where he previously had worked or to the Burbank office where the criminal section was located. Both offices were relatively close to Fanfassian's residence. Schwartz denied Fanfassian's request, however, and assigned him to the West Los Angeles office because that location had an opening and a need for investigating officers. At the time Schwartz made the assignment, he was not aware that Fanfassian had reported any harassment or misconduct by Marquez.

Fanfassian's transfer from SOD to Internal Affairs did not result in any change in his rank, pay grade, or benefits. The transfer did, however, cause Fanfassian to lose the use of a City-issued take-home vehicle. Fanfassian also considered the

transfer to be a “step backwards” in his career because he had worked in Internal Affairs for three years prior to joining SOD, and he believed that the LAPD wanted its officers to continue broadening their work experiences rather than “doing the same job twice.” Fanfassian further believed that his assignment to the West Los Angeles office was a form of punishment known as “freeway therapy” because the location was far from his residence, requiring a long commute.

On or about March 27, 2011, Fanfassian voluntarily transferred from Internal Affairs to the Office of Administrative Services. He applied for an open position as a Transit Liaison Officer and was selected for the position. During his assignment with the Office of Administrative Services, Fanfassian received five positive comment cards for his job performance.

On November 23, 2011, Fanfassian filed an administrative complaint with the California Department of Fair Employment and Housing (DFEH) in which he alleged that the LAPD had retaliated against him for reporting gender-based harassment. At Fanfassian’s request, the DFEH issued an immediate notice of case closure and right-to-sue.

V. Fanfassian is Promoted to Lieutenant and Assigned to the Southwest Division

On April 22, 2012, Fanfassian was promoted to the rank of Lieutenant I. Fanfassian believed that he was promoted at that time because he had taken and passed a civil service test, his name had been placed on a list of officers available for promotion, and his “turn came up on the list.” Commander Matthew Blake, the Commanding Officer of the LAPD’s Office of Operations, was responsible for making placement recommendations for newly promoted lieutenants. Blake decided to assign Fanfassian to the Southwest Division because there was an opening and a critical need for a lieutenant at that location. At the time Blake made the assignment, he was not aware that Fanfassian had reported any harassment or misconduct by Marquez.

Fanfassian believed that his assignment to the Southwest Division was also a form of “freeway therapy” because there were several other police stations that were geographically closer to his residence. When Fanfassian was promoted to a lieutenant, he requested an assignment to one of three locations in the San Fernando Valley, two of which had openings at the time of his promotion. He was not assigned to any of those locations. In addition, other officers who were promoted at the same time but had less seniority than Fanfassian in rank and tenure were given placements that were closer to Fanfassian’s residence than the Southwest Division. Following his placement, Fanfassian made repeated requests to his commanding officers to be transferred to a station that was closer to his residence. On one occasion, the deputy chief at the Southwest Division asked Fanfassian if he was seeking a transfer to a San Fernando Valley location. When Fanfassian confirmed that he was, the chief stated “that’s not

going to happen soon,” but did not provide a reason for his comment. Fanfassian has remained at the Southwest Division since his promotion.

VI. Fanfassian’s Civil Action Against the City

On September 19, 2012, Fanfassian filed this civil action against the City. His complaint alleged two causes of action for (1) retaliation under FEHA, and (2) retaliation under Labor Code section 1102.5. The gravamen of the complaint was that the City retaliated against Fanfassian because he reported to his superiors at the LAPD that he believed that a fellow officer was sexually harassing a female subordinate. On November 18, 2013, the City filed a motion for summary judgment, or in the alternative, summary adjudication on each cause of action alleged in Fanfassian’s complaint.

On May 7, 2014, the trial court granted the City’s summary judgment motion and entered judgment against Fanfassian. The court found that Fanfassian had failed to raise a triable issue of fact as to whether he had suffered an adverse employment action within the meaning of FEHA and Labor Code section 1102.5, and as to whether there was a causal link between any alleged adverse action and his protected activity. The court also found that the City had set forth legitimate, non-retaliatory reasons for its decisions concerning Fanfassian’s employment and that Fanfassian had failed to raise a triable issue of fact as to whether the City’s decisions were motivated by a retaliatory animus. Following the entry of judgment in favor of the City, Fanfassian filed a timely notice of appeal.

DISCUSSION

I. Standard of Review

“[T]he party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, fn. omitted (*Aguilar*).) “Once the [movant] has met that burden, the burden shifts to the [other party] to show that a triable issue of one or more material facts exists as to that cause of action” (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar, supra*, at p. 850.) The party opposing summary judgment “may not rely upon the mere allegations or denials of its pleadings,” but rather “shall set forth the specific facts showing that a triable issue of material fact exists” (Code Civ. Proc., § 437c, subd. (p)(2).) A triable issue of material fact exists where “the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.” (*Aguilar, supra*, at p. 850.)

Where summary judgment is granted, we review the trial court’s ruling de novo. (*Aguilar, supra*, 25 Cal.4th at p. 860.) We consider all the evidence presented by the parties in connection with the motion (except that which was properly excluded) and all the uncontradicted inferences that the evidence reasonably supports. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) We affirm summary judgment where it is shown that no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).)

II. Governing Legal Principles on Retaliation Claims

FEHA provides that it is an unlawful employment practice for “any employer ... or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part.” (Gov. Code, § 12940, subd. (h).) Similarly, under Labor Code section 1102.5, “[a]n employer . . . shall not retaliate against an employee for disclosing information . . . to a government or law enforcement agency . . . if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation.” (Lab. Code, §1102.5, subd. (b).)

When a plaintiff alleges a cause of action for retaliation under FEHA or Labor Code section 1102.5, California courts apply the three-step burden-shifting analysis of *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 (*McDonnell Douglas*) to evaluate the claim. (*Loggins v. Kaiser Permanente Internat.* (2007) 151 Cal.App.4th 1102, 1108; *Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 138.) “[T]o establish a prima facie case of retaliation, a plaintiff must show (1) he or she engaged in a ‘protected activity,’ (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer’s action.

[Citations.] Once an employee establishes a prima facie case, the employer is required to offer a legitimate, nonretaliatory reason for the adverse employment action. [Citation.] If the employer produces a legitimate reason for the adverse employment action, the presumption of retaliation “‘drops out of the picture,’” and

the burden shifts back to the employee to prove intentional retaliation. [Citation.]” (*Yanowitz v. L’Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042.)¹

Proof of intentional discrimination or retaliation often depends on circumstantial evidence because it consists of “subjective matters only the employer can directly know, i.e., his attitude toward the plaintiff and his reasons for taking a particular adverse action.” (*Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 713.) Nevertheless, “[t]he central issue is and should remain whether the evidence as a whole supports a reasoned inference that the challenged action was the

¹ Fanfassian contends that Labor Code section 1102.6 replaces the traditional three-step burden-shifting analysis by requiring the employer to prove a legitimate, non-retaliatory reason for its adverse action under a heightened clear-and-convincing standard. The statute specifically provides that “once it has been demonstrated by a preponderance of the evidence that an activity proscribed by Section 1102.5 was a contributing factor in the alleged prohibited action against the employee, the employer shall have the burden of proof to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in activities protected by Section 1102.5.” (Lab. Code, § 1102.6.) Labor Code section 1102.6 thus describes the employer’s burden of proving a same-decision affirmative defense. (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 239.) It only comes into play once the employee has proven by a preponderance of the evidence that retaliation was a contributing factor in the adverse action, and the employer asserts it would have made the same decision in the absence of the proven retaliation. The clear-and-convincing standard set forth in Labor Code section 1102.6 is not applicable to the *McDonnell-Douglas* burden-shifting analysis.

product of discriminatory or retaliatory animus.” (*Id.* at p. 715.) Accordingly, “an employer is entitled to summary judgment if, considering the employer’s innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the employer’s actual motive was [retaliatory].” (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 361.)

III. The City Was Entitled to Summary Judgment on Fanfassian’s Retaliation Claims

In his causes of action for retaliation in violation of FEHA and Labor Code section 1102.5, Fanfassian alleged that the City retaliated against him in the terms and conditions of his employment because he reported to his superiors at the LAPD his belief that a fellow investigating officer was sexually harassing a female subordinate.² The trial court granted summary judgment in favor of the City on the grounds that Fanfassian failed to make a *prima facie* showing of retaliation, and failed to raise a triable

² In his cause of action for retaliation under Labor Code section 1102.5, Fanfassian alleged that the City also retaliated against him because he reported a violation of the Vehicle Code by a subordinate employee, and a potential misappropriation of money from SOD’s “secret service” funds. In opposing the City’s motion for summary judgment, however, Fanfassian did not present any evidence or argument to show how these alleged disclosures constituted protected activity under Labor Code section 1102.5. On appeal, Fanfassian also does not present any argument regarding these purported disclosures and instead relies solely on his report of alleged sexual harassment by Marquez as the protected activity underlying both his FEHA and Labor Code section 1102.5 claims. We therefore confine our analysis of Fanfassian’s alleged protected activity to his sexual harassment allegations concerning Marquez.

issue of material fact as to whether the City's proffered reasons for the alleged adverse employment actions were pretextual. We conclude that, even assuming that Fanfassian can establish a prima facie case of retaliation, the City set forth legitimate, non-retaliatory reasons for its employment decisions and Fanfassian failed to produce any substantial, responsive evidence of pretext. The City was thus entitled to judgment as a matter of law on Fanfassian's retaliation claims.

A. Legitimate, Non-Retaliatory Reasons

In moving for summary judgment, the City articulated legitimate, non-retaliatory reasons for the challenged actions concerning Fanfassian's employment. These alleged adverse decisions consisted of removing Fanfassian as the Undercover Coordinator in SOD, transferring Fanfassian out of SOD based on three negative comment cards, and reassigning Fanfassian to geographically undesirable work locations following his transfer.

With respect to Fanfassian's tenure in SOD, the City presented evidence that Hernandez made the decision to remove Fanfassian as the Undercover Coordinator in January 2010, and to transfer Fanfassian from the division in December 2010. In his declaration, Hernandez stated that, when he became the commanding officer of SOD in January 2010, he was not satisfied with the undercover officer training program used by prior commands, and he wanted to implement a more structured and intensive program for all undercover officers. Hernandez decided to replace Fanfassian as the Undercover Coordinator because he wanted an individual in the position whom he believed could implement his vision and new direction for the training program. Hernandez further stated that he decided to transfer Fanfassian from SOD in December 2010 because he believed Fanfassian was

negatively commenting on his supervision of SOD and resisting his new direction for the unit. In making the transfer decision, Hernandez took into account the negative comment cards that had been issued to Fanfassian between March and December 2010 for (1) openly criticizing a subordinate's job performance in the SOD squad room, (2) failing to timely correct a subordinate's violation of SOD's confidentiality protocol, and (3) telling a subordinate that the undercover officers in SOD were not being properly trained. Hernandez decided that a transfer from SOD was warranted because Fanfassian's actions and statements were detrimental to the morale of the unit and its undercover officers.

With respect to Fanfassian's post-SOD assignments, the City presented evidence that Schwartzer made the decision to place Fanfassian at the Internal Affairs' West Los Angeles office when he was transferred from SOD, and that Blake made the decision to place Fanfassian at the LAPD's Southwest Division when he was promoted to a lieutenant. In their declarations, both Schwartzer and Blake stated they made the assignment because there was an opening at that particular location and a need for an officer of Fanfassian's rank and/or job position.

Based on this evidence, the City met its burden on summary judgment of establishing legitimate, non-retaliatory reasons for its employment decisions. Accordingly, the burden shifted to Fanfassian to present competent admissible evidence that the City's proffered reasons were pretextual or that the City otherwise acted with a retaliatory intent.

B. Pretext

The plaintiff in an action for unlawful discrimination or retaliation “may establish pretext “either directly by persuading the court that a discriminatory [or retaliatory] reason more likely motivated the employer or indirectly by showing that the employer’s proffered explanation is unworthy of credence.” [Citation.]” (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 68-69.) To avoid summary judgment, the plaintiff must present ““specific” and “substantial”” evidence of pretext. (*Id.* at p. 69.) “In responding to the employer’s showing of a legitimate reason for the complained-of action, the plaintiff cannot “simply show the employer’s decision was wrong, mistaken, or unwise. Rather, the employee “must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer’s proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them ‘unworthy of credence,’ [citation], and hence infer ‘that the employer did not act for the [asserted] non-discriminatory [or non-retaliatory] reasons.’”” [Citations.]” (*McRae v. Department of Corrections & Rehabilitation* (2006) 142 Cal.App.4th 377, 389-390.) Fanfassian has failed to meet that burden here.

Fanfassian argues that he presented direct evidence that the City acted with a retaliatory animus after he made an allegation of sexual harassment against Marquez. He specifically asserts that such direct evidence is shown by a comment made by two investigating officers who approached Fanfassian about his allegation and told him that he “shouldn’t be putting a jacket” on Marquez. “Direct evidence of retaliation may consist of remarks made by decisionmakers displaying a retaliatory motive. [Citation.]’ [Citation.]” (*Colarossi v. Coty US Inc.* (2002) 97

Cal.App.4th 1142, 1153.) In this case, however, the officers who made the comment to Fanfassian had no supervisory authority over him, and there is no evidence that either officer was ever involved in any decision concerning Fanfassian's employment. The stray remark made by these non-decisionmakers in response to Fanfassian's sexual harassment allegation fails to demonstrate a retaliatory intent on the part of the City. (*Gibbs v. Consolidated Services* (2003) 111 Cal.App.4th 794, 801 [“stray remarks” that “played no role in the [adverse] decision” are insufficient to show discriminatory intent]; *Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 809 [“isolated remark” that is “highly ambiguous as far as discriminatory animus” is “entitled to virtually no weight in considering whether the [adverse action] was pretextual”].)

Fanfassian also contends that he presented circumstantial evidence of pretext by showing that the City failed to take appropriate action to investigate and discipline Marquez for his sexually harassing conduct. The undisputed facts demonstrate, however, that the conduct reported by Fanfassian did not rise to the level of sexual harassment and that the City took appropriate action under the circumstances. Specifically, Fanfassian reported to his superiors at the LAPD that he had observed Marquez talking to a female undercover officer in one-on-one conversations away from other people, and that he suspected Marquez's conduct toward the officer was bordering on sexual harassment. Although Mariscal did not find Fanfassian's suspicions about Marquez to be credible, she had a discussion with Marquez about the allegations. Solano likewise did not believe that the conduct reported by Fanfassian rose to the level of sexual harassment or officer misconduct. Nevertheless, Solano instructed Fanfassian,

who was then the Undercover Coordinator for the unit, to monitor the situation. Solano also made a point of reinforcing the LAPD's policy against sexual harassment at the next monthly supervisor meeting. Fanfassian speculates that Mariscal may have inappropriately disclosed his reported allegations about Marquez to her other subordinates because two of these officers accused Fanfassian of "putting a jacket" on Marquez shortly after he made the report. At his deposition, however, Fanfassian testified that when these officers approached him, he asked them how they knew about his report, and they related that they heard about it from Marquez, not Mariscal. On this record, the City's response to Fanfassian's reported suspicions about Marquez does not establish that its subsequent employment actions regarding Fanfassian were a mere pretext for unlawful retaliation.

Fanfassian further claims that the temporal proximity between his September 2009 report about Marquez and his January 2010 removal from the Undercover Coordinator position is sufficient to give rise to an inference of intentional retaliation and thus defeat summary judgment. While it is true that a plaintiff may make a *prima facie* showing of a causal link "by producing evidence of nothing more than the employer's knowledge that the employee engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory employment decision," such evidence "only satisfies the plaintiff's initial burden." (*McRae v. Department of Corrections and Rehabilitation, supra*, 142 Cal.App.4th at p. 388.) "[T]emporal proximity alone is not sufficient to raise a triable issue as to pretext once the employer has offered evidence of a legitimate, [non-retaliatory] reason for the [adverse decision]. [Citations.]" (*Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327,

353; see also *Loggins v. Kaiser Permanente Internat.*, *supra*, 151 Cal.App.4th at p. 1112 [temporal proximity “does not, without more, suffice . . . to show a triable issue of fact on whether the employer’s articulated reason was untrue and pretextual”].) “Instead, an employee seeking to avoid summary judgment cannot simply rest on the prima facie showing, but must adduce substantial additional evidence from which a trier of fact could infer the articulated reasons for the adverse employment action were untrue or pretextual.” (*Id.* at p. 1113.) Hence, the mere proximity in time between Fanfassian’s protected activity and his removal as the Undercover Coordinator does not, standing alone, show pretext.

Fanfassian asserts that he presented additional evidence to establish pretext by showing that “up to the time of his removal altogether from SOD, [his] performance was nothing but positive.” The undisputed evidence, however, does not support this assertion. Rather, the record demonstrates that, during Fanfassian’s tenure in SOD, his supervisors’ assessments of his job performance were mixed. In the 15 months prior to his removal from SOD, Fanfassian received three positive comment cards for his strong performance in leading certain undercover operations and performing other tasks; however, he also received three negative comment cards for his poor performance in supervising and interacting with subordinate officers. With respect to the specific incidents that resulted in the negative comment cards, Fanfassian argues that they concerned minor personnel issues that were not serious enough to warrant his removal from SOD. Yet apart from his testimony, Fanfassian did not offer any evidence to show that the comment cards were pretext for retaliation, such as evidence that other similarly

situated officers in SOD committed comparable infractions but were not removed from the division or otherwise subject to discipline. Instead, Fanfassian claims that the negative comment cards and other criticisms of his performance must have been motivated by a retaliatory animus because they were unjustified. However, a plaintiff does not demonstrate a triable issue of fact simply by showing that the employer's actions were wrong or unwise. If non-retaliatory, the employer's "true reasons need not necessarily have been wise or correct'. . . . [T]he ultimate issue is simply whether the employer acted with a motive to discriminate [or retaliate] illegally." (*Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at p. 358 [italics omitted]; see also *Morgan v. Regents of University of California*, *supra*, 88 Cal.App.4th at p. 76 ["employee's subjective personal judgments of his or her competence alone do not raise a genuine issue of material fact"]). Here, Fanfassian's subjective belief that the alleged adverse actions were unwarranted is insufficient to raise a triable issue as to whether his superiors in SOD acted with a retaliatory intent.

Fanfassian also has failed demonstrate a triable issue of fact as to whether his post-SOD assignments were motivated by a retaliatory animus. The City presented undisputed evidence that, after Fanfassian's removal from SOD, Schwartzer decided to assign him to Internal Affairs' West Los Angeles office based on that location's need for investigating officers, and that Schwartzer had no knowledge that Fanfassian had engaged in any protected activity when he made the assignment. While there was evidence that Schwartzer had been told by Hernandez that Fanfassian had "an attitude problem," none of the evidence showed that Hernandez or anyone else with knowledge of

Fanfassian's report about Marquez ever shared that information with Schwartz. The City also presented undisputed evidence that, upon Fanfassian's promotion, Blake assigned him to the LAPD's Southwest Division based on that location's critical need for a lieutenant, and that Blake likewise had no knowledge of Fanfassian's protected activity at the time of the assignment. Fanfassian nevertheless asserts that any knowledge that his supervisors at SOD had about his protected activity may be imputed to Schwartz and Blake for purposes of showing that their subsequent decisions to assign Fanfassian to geographically undesirable locations were retaliatory. It is true that "when an employment decision is influenced by several people, 'a decision maker's ignorance does not "categorically shield the employer from liability if other substantial contributors to the decision bore the requisite animus. [Citation.]"' [Citation.]" (*Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1251.) In this case, however, there was no evidence that anyone other than Schwartz and Blake had any involvement in deciding where Fanfassian should be placed following his removal from SOD. Because these particular decision-makers lacked any knowledge of Fanfassian's protected activity, Fanfassian cannot establish pretext in their challenged employment decisions.

In sum, the City presented substantial evidence to show that it had legitimate, non-retaliatory reasons for its alleged adverse employment actions. Because Fanfassian failed to come forward with "evidence supporting a rational inference that intentional [retaliation] . . . was the true cause of [the City's] actions," the City was entitled to summary judgment on Fanfassian's causes of action for retaliation in violation of

FEHA and Labor Code section 1102.5. (*Guz v. Bechtel National, Inc., supra*, 24 Cal.4th at p. 361.)

DISPOSITION

The judgment is affirmed. The City shall recover its costs on appeal.

ZELON, Acting P. J.

We concur:

SEGAL, J.

KEENY, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.